# Supreme Court of the United States.

## OCTOBER TERM, 1888.

*No. 1129.*

THOMAS WALSTON AND WIFE, PLAINTIFFS IN ERROR,

*vs.*

JOSEPH NEVIN, ET AL., DEFENDANTS IN ERROR.

The plaintiffs in error object to the hearing of the motion of defendants in error to dismiss and affirm until after the record is printed.

B. F. BUCKNER,
*For Plaintiffs in Error.*

SUPREME COURT OF THE UNITED STATES.

THOMAS WALSTON and EMMA CRAIG WALSTON, Plaintiffs in Error,

*vs.*

JOSEPH NEVIN and SAMUEL B. RICHARDSON, Defendants in Error.

*Affidavit.*

B. F. Buckner, having sworn, says that he is attorney for the plaintiffs in error, and that he verily believes that it will be necessary to a correct understanding and decision of the questions involved in the motion of the defendants in

error to dismiss and affirm, (of the making of which on November 26th, 1888, he has received notice), that the entire record should be printed. That he is advised and believes that it is the duty of the defendants in error, under the practice of this Court, to cause the record to be printed in cases of motions to dismiss or affirm made before the case is regularly reached on the docket, and that it will be inconvenient and laborious to prepare a brief without a printed copy of the record.

B. F. BUCKNER.

Subscribed and sworn to by B. F. Buckner, before me, a notary public for Jefferson county, Kentucky, this 19th day of November, 1888.

Witness my hand and notarial seal.

[SEAL.] A. W. KEATING,
*N. P., J. C., Ky.*

Endorsed: Sup. Court U. S. 1888. Oct. Term. No. 1129. Thomas Walston, Trustee, *et al.*, pl'ffs in error, *vs.* Joseph Nevin *et al.* Objection by pl'ffs in error to trial of motion to dismiss without printed record, with affidavit. Filed Nov. 21, 1888.

# Supreme Court of the United States.

**OCTOBER TERM, A. D. 1888.**

*No. 1129.*

THOMAS WALSTON *et al.*, PLAINTIFFS,

*vs.*

JOSEPH NEVIN *et al.*, DEFENDANTS.

**ERROR TO THE KENTUCKY COURT OF APPEALS.**

The defendants in error, Joseph Nevin and Samuel B. Richardson, submit that the plaintiffs in error, Thomas Walston and his wife, Emma Craig Walston, have sued out from this Court their writ of error to the Kentucky court of appeals for the purpose of having this Court review and reverse a judgment of that court in an action commenced by the defendants in error in the Louisville chancery court to enforce a lien given by a statute of the State of Kentucky approved March 24, 1882, entitled "An act to amend the charter of the city of Louisville," and by which act it was, among other things, provided that all of the public ways of the State in the city of Louisville shall be under the exclusive management and control of the general council of that city, with a power in the general council to improve them by original construction in such manner and of such mate-

rial as may be provided by an ordinance of that city or a contract approved by the general council; that the word square as used in that act should be construed to mean each subdivision of territory bounded on all sides by principal streets; that such improvements of the public ways in the city of Louisville should be made at the exclusive cost of the owners of the land in the quarters of squares binding on such public ways so improved according to the number of square feet owned by the parties, respectively, within the limits, as defined by the act, to be apportioned by the general council, and when such improvements have been made it then becomes the duty of the city engineer to give notice in some newspaper printed and published daily in the city of Louisville of the time when and of the place where he will inspect and try whether such improvement as made conforms to the ordinance of and contract with the city therefor, and under the act in question every person owning land within the tax limits subject to assessment to pay the cost of such improvement may appear before such engineer in person, by agent or attorney, and at the time and place specified in the notice, and may be heard as to whether such improvement conforms to the ordinance and contract therefor; that, upon the completion, inspection by the city engineer, and acceptance by the city of the improvement by the original construction of such public ways, the general council shall proceed to apportion the cost of such improvement in the manner hereinbefore stated, and it is then made the duty of the clerk of the board of councilmen to issue and deliver to the person making such improvement and in payment therefor warrants against the persons and in and for the amounts as ascertained by the apportionment of the general council, and by the act in question it is expressly enacted that a lien shall exist for the cost of such improvement, for the apportionment, and interest thereon, at the rate of six per cent. per annum, against the respective lots, and payment may be enforced upon the

property bound therefor by proceedings in court, and no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract, but the general council of the courts in which suit may be pending shall make all corrections, rules, and orders to do justice to all parties concerned."

Under this act the general council procured the improvement by original construction to be made of Chestnut from Mercer to Twenty-sixth streets, the distance of one square. The streets named are all public ways of the State and in the city of Louisville, and the territory contiguous to Chestnut street and on each side of it between the streets named is defined into squares by principal streets. The plaintiffs in error own two lots of land within the tax limits defined by the act in question subject to assessment to pay the cost of the improvement of Chestnut street between the streets named.

The improvement by original construction of Chestnut street between the streets named was made and completed by the defendant in error, Joseph Nevin, under an ordinance of and the contract with the city of Louisville; was, on its completion, and after notice given as required by the act, inspected by the city engineer, who decided that the improvement was made in accordance with the ordinance authorizing the same and the contract therefor, and was accepted by the city of Louisville. The general council thereupon apportioned the cost of the improvement in the manner required by the act, and, among others, apportioned against the plaintiffs in error a sum on each of their lots as their share of the cost, and for which sums the clerk of the board of councilmen issued and delivered to the defendant in error, Joseph Nevin, warrants against the persons as determined by the apportionment of the general council, and, among others, two against the plaintiffs in error. The defendant in error, Joseph Nevin, made an equitable

assignment of these warrants to the defendant, Samuel B. Richardson, and to enforce the lien given by the statute to secure the payment of these warrants this action was commenced in the Louisville chancery court. The plaintiffs in error were duly summoned, appeared, and filed their joint and several answers in the action, and, after issues were made, the action was tried by the Louisville chancery court and judgment entered directing the enforcement of the lien by a sale of the lots of land, and on appeal to the court of appeals this judgment was affirmed. The plaintiffs in error made defense in the Louisville chancery court that the act in question and all proceedings under it were in conflict with section one of article fourteen of the amendments to the Constitution of the United States.

The chancellor ruled that the tax or assessment could only be enforced in a judicial proceeding with notice to and on a full opportunity being afforded for a hearing to the parties to be affected by it, and that, such being the case, there was no violation of the Constitution of the United States forbidding the States to deprive any person of life, liberty, or property without due process of law; that the act was general and applied alike to all persons, and therefore the State had not denied to the plaintiffs in error the equal protection of its laws. The plaintiffs in error have sued out the present writ on the assumption that by the act and proceedings set out the State of Kentucky has taken or will take their property, and that such act and proceedings are not due process of law, and that the State of Kentucky has denied to them the equal protection of its laws, which the defendants in error, conceding the technical jurisdiction of this Court, conceive the writ has been sued out for the mere purpose of delay, and that the question upon which the jurisdiction of this Court is made to depend is too frivolous to require argument, and in pursuance of notice now move the Court to dismiss the writ for want of jurisdiction in this Court to try it, and move the Court to affirm as a de-

lay case the judgment of the Kentucky court of appeals, because it is manifest the writ was sued out for the purpose of delay merely and because the question upon which the jurisdiction of this Court depends is too frivolous to require any argument.

J. K. GOODLOE,
*Att'y for Defendants in Error.*

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# Supreme Court of the United States.

OCTOBER TERM, A. D., 1888.

John G. Roach, Julius Winter, Fred Jansen, Gabriel L. Sprink, Andrew McDonald, Jane McDonald, - Plaintiffs,

VERSUS

Joseph Nevin, Samuel B. Richardson, - - - Defendants.

*ERROR TO THE KENTUCKY COURT OF APPEALS.*

J. K. GOODLOE,
*Attorney for Defendants in Error.*

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1888.

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JOHN G. ROACH, JULIUS WINTER, FRED JANSEN, GABRIEL L. SPRINK, ANDREW McDONALD, JANE McDONALD, - - *Plaintiffs,*

*VERSUS*

JOSEPH NEVIN, SAMUEL B. RICHARDSON, - - - - - - - - - - *Defendants.*

**Error to the Kentucky Court of Appeals.**

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STATEMENT OF FACTS.

There was passed by the General Assembly of the Commonwealth of Kentucky, and there has been in force ever since the date of its passage, an act approved by the Governor on the 24th day of March, 1882, and entitled "An Act to amend the Charter of the city of Louisville" (Vol. 1, page 990, Sess. Acts, 1881-2), and by which act it was among other things provided that—

"Public ways as used in this act shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares, and shall be under the exclusive management and control of said city, with power to improve them by the original construction thereof as may be prescribed by ordinance. Improvements as applied to public ways shall mean all work and materials used upon them in the construction thereof, and shall be made and done as may be prescribed either by ordinance or contract approved by the General Council. When the improvement is the original construction of any street, road, lane, alley, or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be apportioned equally by the

General Council according to the number of square feet owned by them respectively, except that corner lots of thirty feet front and extending back, as may be prescribed by ordinance, shall pay twenty-five per cent more than others for such improvements. Each subdivision of territory, bounded on all sides by principal streets, shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public way shall state the depth on both sides fronting said improvement to be assessed for the cost of making the same according to the number of square feet owned by the parties respectively within the depths as set out in the ordinance. A lien shall exist for the cost of the original improvement of public ways, for the apportionment and interest thereon at the rate of six per cent per annum against the respective lots, and payment may be enforced upon the property bound therefor by proceedings in court, and no error in the proceedings of the General Council shall exempt from payment after the work has been done as required either by the ordinance or contract, but the General Council or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned.

"When the improvements in public ways have been made, and the contract therefor completed, the City Engineer shall, by one insertion in one of the daily newspapers published in Louisville, give notice of the time and place fixed for the inspection and reception of the work by the City Engineer or either of his assistants or deputies, and such owners, their agents and representatives, may appear and be heard before such engineer, his assistant or deputy, as to whether such improvements have been made in accordance with the ordinance authorizing the same and the contract therefor."

Under the provisions of this act and other charter provisions of the local government, there was passed by the General Council of the city of Louisville, and approved by the Mayor on the 6th day of September, 1882, and printed and published in the manner and by the agencies provided for in the charter acts, an ordinance which reads as follows:

No. 2281.

"An ordinance for improving a part of Broadway from the center line of Twenty-sixth Street to the western boundary line of the city.

"Be it ordained by the General Council of the city of Louisville, that the carriage-way of Broadway, from the center line of Twenty-sixth Street to the western boundary line of the city, shall be fifty feet in width, and shall be improved by grading, curbing, and paving with McAdam pavement, with corner-stones at the intersection of streets and alleys, block-stone gutters, and foot-way crossings across all intersecting streets and alleys. Said work shall be done in accordance with the provisions of an ordinance approved on the 21st day of August, 1880, entitled 'General ordinance concerning the improvement of streets,' and at the cost of the owners of ground fronting the improvement on the north side, extending back to a line midway between Broadway and Elliott Street, and on the south side to a line parallel to the line midway between Broadway and Elliott Street, and distant from it $494\frac{875}{1000}$ feet, measured parallel with Twenty-seventh Street. The cost to be equally apportioned among the owners of property according to the number of square feet of ground owned respectively within the limits set out."

On and for many years prior to the 6th day of September, 1882, Broadway was and had been one of the public ways in the city of Louisville, its direction was east and west, and extended from the eastern to and beyond the western limits of the city. Twenty-sixth Street was and had been one of the public ways in the city of Louisville, its course was north and south, and extended from the northern to the southern limits of the city. Elliott Street was and had been one of the public ways in the city of Louisville, its course was east and west, commenced on the west side of Twenty-sixth Street, and extended west to and beyond the western boundary line of the city, and was the next street to Broadway on the north, and Twenty-seventh Street was and had been one of the public ways in the city of Louisville, its course was north and south, commenced on the north side of Broadway and extended north to and beyond Elliott Street, and was the next street to Twenty-sixth Street on the west.

Twenty-sixth Street, at its point of intersection with Broadway, was eight hundred feet east of and was parallel with the direction of the western boundary line of the city.

Twenty-seventh Street was parallel with, and four hundred and twenty-nine feet and six inches west of Twenty-sixth Street.

The south line of Elliott Street, measured on the west line of Twenty-sixth Street, was three hundred and six feet and nine inches, and, measured on the western boundary line of the city, was three hundred and eighty-four and two one-hundredths feet north of the north line of Broadway.

Prior to the year 1868, Broadway, between Twenty-sixth Street and the western boundary of the city, was but forty feet in width; but prior to the year 1870 the owners of property on the north side of Broadway, between the points designated, increased its width by a dedication of a strip from Twenty-sixth Street to the western boundary line of the city forty feet in depth, and some of the owners of property on the south side of Broadway, between the points designated, further increased the width of Broadway by dedications to the public of strips forty feet in depth, so that on the 6th day of September, 1882, Broadway at its intersection with Twenty-sixth Street was eighty feet in width, and at its intersection with the western boundary line of the city was one hundred and twenty feet in width. The direction of neither Broadway nor Elliott Street was at right angles to the direction of Twenty-sixth Street, and from Twenty-sixth Street westwardly the courses and directions of Broadway and Elliott Street diverged from each other. Prior to the year 1870 the owners of the property on the west side of Twenty-sixth Street, between Broadway and Elliott Street, had, by dedication to the public, added to the width of Twenty-sixth Street between the streets named fifteen feet, and on the 6th day of September, 1882, the west line of Twenty-sixth Street north of Broadway was fifteen feet further west than the west line of Twenty-sixth Street south of Broadway.

The territory on neither side of Broadway between Twenty-sixth Street and the western boundary line of the city was not on the 6th day of September, 1882, nor had it ever

been defined into squares by principal streets, nor had Broadway prior to September the 6, 1882, between the center line of Twenty-sixth Street and the western boundary line of the city ever in any manner or to any extent been improved.

At and before the date of the institution of this action, and on and prior to the 6th day of September, 1882, the plaintiffs in error each owned and possessed lands within the taxable limits as defined by the ordinance set out. The plaintiff in error, John G. Roach, owned two lots, one containing 21,853 square feet, and the other 12,061 square feet; the plaintiff in error, Julius Winter, owned one lot containing 54,400 square feet; the plaintiff in error, Fred Jansen owned two lots, one containing 35,675 square feet, and the other 35,532 square feet; the plaintiff in error, Gabriel L. Sprink, owned a lot containing 39,482 square feet, and the plaintiff in error, Jane, the wife of the plaintiff in error, Andrew McDonald, owned a lot containing 4,955 square feet of ground. The entire number of square feet of ground within the taxable limits of the ordinance set out was 279,871.

Immediately after the publication of the ordinance quoted the city of Louisville advertised in three newspapers, printed and published daily in that city, for contractors to undertake the improvement provided for in the ordinance, and the defendant in error, Joseph Nevin, having proposed to the city the terms and conditions upon which he would undertake to complete the improvement, was by the city awarded the contract therefor; and thereupon the city of Louisville and the defendant in error, Joseph Nevin, entered into a contract, which was reduced to writing, signed, dated, and mutually delivered on the 20th day of September, 1882, and reported to and approved by the General Council on the 21st of September, 1882, and which reads as follows, to wit:

ORDINANCE No. 2281.

"This agreement, made on the 20th day of September, 1882, between the city of Louisville, by its Mayor, of the first part, and Joseph Nevin, principal, and J. Navin, surety, of the second part, *witnesseth*,

"That the said parties of the second part agree and bind themselves that the said Joseph Nevin will improve the carriage-way of Broadway Street, fifty feet in width, from the center line of Twenty-sixth Street to the western boundary line of the city, by grading, curbing, and paving with McAdam pavement, with corner-stones at the intersection of streets and alleys, block-stone gutters and foot-way crossings across all intersecting streets and alleys required to be so improved, by an ordinance passed by the General Council of said city, and approved by its Mayor, on the 6th day of September, 1882, and entitled, 'An ordinance for improving a part of Broadway, from the center line of Twenty-sixth Street to the western boundary line of the city,' and that said work shall be done according to the provisions of said ordinance and of the ordinances therein mentioned, all of which are made part hereof as fully as if the same were herein inserted, and that said work shall be completed within four months after the approval of this contract by the General Council, or within such time thereafter as shall be directed or allowed by the General Council. But the city reserves the right to have said work suspended by the City Engineer, whenever for causes satisfactory to him he shall so direct, but such suspension shall be reported to the said Council for approval.

"For the said work the said Joseph Nevin is to be paid as follows: For excavation, thirty cents per cubic yard; for curbing, ninety cents per running foot; for corner-stones, two feet, four dollars each; for foot-way crossings, two dollars and ninety cents per running foot, to include buttress-wings and range paving, and eleven dollars and thirty-five cents per square of one hundred superficial feet for all paving between the curbs, except foot-way crossings.

"In testimony whereof, the Mayor of said city hereto subscribes his name and affixes the seal of said city, and the parties of the second part hereto subscribe their names the day and year first above written.

"CHARLES D. JACOB, *Mayor.*
[SEAL.] "JOSEPH NEVIN, *Contractor.*
"J. NAVIN, *Surety.*"

The defendant in error, Joseph Nevin, in pursuance of this contract, and under the immediate supervision and direction of the City Engineer, did complete the improvement of the carriage-way of Broadway, fifty feet in width, from the center line of Twenty-sixth Street to the western

boundary line of the city, and on its completion the City Engineer gave notice by one insertion in the *Courier-Journal*, a newspaper printed and published daily in the city of Louisville, of the time when and of the place where he would inspect and try whether the defendant in error, Joseph Nevin, had completed the improvement of the carriage-way of Broadway, fifty feet in width, from the center line of Twenty-sixth Street to the western boundary line of the city, in accordance with the ordinance authorizing the same and the contract therefor. And, at the time and place specified in the notice, the City Engineer did inspect and try whether, and did decide that the defendant in error, Joseph Nevin, had completed the improvement of the carriage-way of Broadway, from the center line of Twenty-sixth Street to the western boundary line of the city of Louisville, in accordance with the ordinance authorizing the same and the contract therefor, and did on behalf of, for, and in the name of the city of Louisville, accept and receive the improvement.

The contract price for the improvement was $9,193.36, and the General Council proceeded to apportion this sum equally among the owners of the 279,871 square feet of ground embraced in the taxable limits as defined by the ordinance set out and according to the number of square feet owned by each respectively. And among others the General Council apportioned against the plaintiff in error, John A. Roach, on account of his lot of 21,853 square feet, the sum of $717.84; and on account of his lot of 12,061 square feet, the sum of $396.19; against the plaintiff in error, Julius Winter, on account of his lot of 54,400 square feet, the sum of $1,786.96; against the plaintiff in error, Fred Jansen, on account of his lot of 35,675 square feet, the sum of $1,171.87; and on account of his lot of 35,532 square feet, the sum of $1,167.18; against the plaintiff in error, Gabriel L. Spink, on account of his lot of 39,482 square feet of ground, the sum of $1,296.93; and against the plaintiff in error, Jane McDonald,

the sum of $162.76, on account of her lot of 4,955 square feet, and for each of which amounts apportionment warrants were issued by the clerk of the Board of Councilmen, in pursuance of a joint resolution of the General Council, approved by the Mayor on the 22d day of June, 1883. These warrants, when issued, were by the defendant in error, Joseph Nevin, sold and assigned to the defendant in error, Samuel B. Richardson, and to enforce the payment of these warrants the defendants in error instituted their action in the Louisville Chancery Court against the plaintiffs in error, and caused summons to be issued against and served on each of the plaintiffs in error, requiring them within not less than twenty days, if in Jefferson County, Ky., and not less than sixty days if out of the State, to appear in the Louisville Chancery Court and make answer to the petition of the defendants in error. The Louisville Chancery Court is one of the courts of the State of Kentucky, is a court of record, of general jurisdiction, and in this case had jurisdiction of the subject-matter of the action, and of each of the parties to it. To and in this action each of the plaintiffs in error entered his appearance and filed his answer, consisting of denials, avoidances, and counter-claims, and in neither of which answers is there to be found any reference to the Constitution of the United States, or to any provision of it, but on the 28th day of March, 1884, while this action was pending in the trial court, each of the plaintiffs in error tendered, and caused to be filed in the action, an amended answer, which reads as follows:

"The defendant, for amended answer, herein says that the said proceedings by which the property of this defendant in this action is sought to be rendered subservient to the burden of said street improvement so called, named in the petition, are and were void *ab initio*, because, he says, he never had any notice of the alleged proceedings named in the petition, and because he never had any opportunity to be heard and to object to the errors, injustice, and inequality in the plan of apportioning the cost of said alleged

improvement upon the contiguous property, and that he was entitled, by the provisions of the Constitution of the United States, and especially under the first section of the Fourteenth Amendment to the Constitution of the United States, wherein it is prohibited to the States to deprive any person of life, liberty, or property without due process of law, or to deny to any person within their jurisdiction the equal protection of the law to an opportunity to be heard in relation to the assessment or apportionment of the cost of said improvement on his property; that he has never had, nor has he ever been afforded, such an opportunity. He says that before any lien could be lawfully created on his property for the payment of the cost of said improvement or any part thereof, he was entitled to be present and to have a hearing upon the matter of such apportionment, and the right to object to the injustice and inequality of the plan of apportionment adopted, or pretended to have been adopted, by the City Council of Louisville. That the plan alleged by the plaintiffs to have been adopted by the said Council is unjust, arbitrary, and unequal; that the taxing district so established is irregular and unequal in shape, and the tax is thereby imposed on contiguous property in an unequal, unjust, and arbitrary manner; that on the north side of said district the property is taxed to a depth of 192.01 feet at the western end of said district, and at the eastern end to a depth of only 153.75 feet; that on the southern side of said district said property is taxed to a depth of 152.65 feet at the west end of said alleged district, and to a depth of 232.01 at the eastern end thereof. Wherefore defendant prays to be hence dismissed with his cost herein most unjustly sustained."

The allegations of each of these amended answers were by agreement of the parties controverted by record, and on the trial had before the Chancellor of the issues made in the case, the Chancellor dismissed the petition, and denied to the defendants in error any relief, for the reason alone that in his opinion the carriage-way of Broadway, from the center line of Twenty-sixth Street to the western boundary line of the city, had been mislocated by the City Engineer and by the defendant in error, Joseph Nevin, and this conclusion rendered it unnecessary for the Chancellor to, and he therefore did not, pass on the Federal question attempted to be raised by the amended answer set out.

From the judgment of the Chancellor the defendants in error prayed and were granted an appeal to the Kentucky Court of Appeals; their appeal was there heard, and it was the judgment of the Court of Appeals that the judgment of the Chancellor be reversed and set aside, and that the Chancellor proceed to render a judgment in favor of the defendants in error, and against the plaintiffs in error, for the amounts of the respective warrants, interest, and cost, and enforce the statutory lien as prayed for in the petition.

In response to a petition for rehearing, addressed by the plaintiffs in error to the Court of Appeals, that court replied that neither the act nor ordinance set out, nor the proceedings under them, were in conflict with the Constitution of the United States, and plaintiffs in error, to correct what is conceived by them to be manifest errors in the record to their prejudice, have, by their writ, brought their complaints to the final arbitrament of this tribunal, while the defendants in error, conceiving that there is no Federal question presented in the record, or, if so, that it was decided right in the State tribunals, have entered their motion to dismiss the writ for want of jurisdiction, and have coupled with it a motion to affirm as a delay case, and upon these motions this record is now on submission to the court.

## Statement of Law.

It must be conceded that section one of article fourteen of the amendments to the Constitution of the United States is simply a restriction upon the powers of the States, and to successfully maintain the writ of error in this case it must be made to appear by the record that the State of Kentucky has deprived the plaintiffs in error of their property without due process of law, or has denied to them the equal protection of its laws. It must go without discussion at this day that the judgment of the Kentucky Court of Appeals, to which the present writ of error is directed, is conclusive on

all questions mooted in this record, with the single exception as to whether the act quoted is in conflict with the Federal Constitution. The question to be here decided is not whether the State tribunals, having jurisdiction of the parties and of the subject-matter, have followed the law, but whether the law, if followed, would have furnished the plaintiffs in error the protection guaranteed by the Federal Constitution. Irregularities and mere errors can only be corrected in the State Courts, and not in this tribunal. The authority of this court does not extend beyond an examination of the jurisdiction of the power of the State courts to proceed at all.

The plaintiffs in error insist that the act in question is in conflict with the first section of the Fourteenth Amendment to the Constitution of the United States, because,

*First.* Under its provisions unjust, unequal, and arbitrary burdens are imposed to pay the cost of improving public ways in the city of Louisville.

*Second.* The act in question fails to provide for notice to or to give to the parties to be affected an opportunity to be heard on the plan of the apportionment or limits of the tax district.

*Third.* The act fails to provide a tribunal to ascertain the extent of benefits resulting to the contiguous property from the improvements of public ways, and that taxation for local improvements upon contiguous property in excess of the benefits thereto is the taking of private property without due process of law.

The reasons assigned by the plaintiffs in error as the grounds for their contention that the act is in conflict with the Federal Constitution will be examined in the order in which they are here stated.

The act in question was construed by the Kentucky Court of Appeals in the case of Preston v. Roberts, 12 Bush, 585, where the court say:

"The language of the charter already quoted would seem to contemplate that the assessment in a case like this should

be extended an equal depth on each side of the street. The legislature can not have intended to confer upon the city government arbitrary power to distribute such burdens according to its mere will, in disregard of the rule requiring proximate equality; and if such was its intention, we feel no hesitation in saying that no such power could be constitutionally conferred. Absolute arbitrary power over the property of the citizen our Bill of Rights declares exists nowhere in a free government. It seems to us that the true rule is to extend the assessment in cases like this an equal distance on each side of the street, and that the General Council has no power to do otherwise, except in those cases where there are parallel streets on each side already dedicated, and not beyond what might be reasonably regarded as the distance of a square from the street to be improved, and then the assessment should extend each way one half the distance to such parallel street."

The act in express terms provides for equality in the imposition of the burdens authorized, and then further provides that "the General Council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned. The act further provides that the liability to pay or discharge the burdens for local improvements can only be enforced in regular judicial proceedings, where the party taxed is to have due notice and full opportunity to defend against the claim.

This court, in the case of Davidson v. New Orleans, 96 U. S. 97, say:

"Before the assessment could be collected or become effectual, the statute required that the *tableau* of assessments should be filed in the proper district court of the State; that personal service, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown or could not be found. This was complied with, and the party complaining here appeared and had a full and fair hearing in the court of the first instance, and afterward in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution."

It is manifest on inspection, and requires no argument to demonstrate that the act in question does not authorize the imposition of unjust, unequal, or arbitrary burdens; and if, under the provisions of the act, and in violation of them, unjust, unequal, or arbitrary taxes or burdens are imposed, the act in question gives to the party taxed every opportunity to defend against them, and the courts will not enforce their collection; and it can be safely said that if this be not due process of law, then the words as used in the Constitution can have no definite meaning.

2. The plaintiffs in error insist that the act in question was in conflict with section one of article fourteen of the amendments to the Constitution of the United States, because it failed to provide for a notice to, or to give to the parties to be affected an opportunity to be heard on the plan of the apportionment or limits of the tax district.

In the case of Beck v. Obst, 12 Bush, 268, the Court of Appeals construed the act in question, and ruled that the act in question did give to the parties affected a full opportunity to be heard on the plan of the apportionment. The court there say:

"Indeed, it may well be doubted whether the legislature possessed the power to compel lot-owners, who had already been assessed to improve in front of their property, to contribute in common with others who have paid nothing, to pay for the improvement of the residue of the alley. Such a rule of assessment would violate a fundamental principle of the law respecting public burdens, which requires approximate equality. The charter provides that the General Council, or the courts in which proceedings may be pending to enforce the claims for improvements in public ways, shall make all corrections, rules, and orders to do justice to all parties. That provision is broad enough to cover a case like this, and we think the court should have overruled the demurrer to the answer; and if the facts therein stated were established, the apportionment should have been readjusted so as to equalize the cost of the improvement of the alley from Fifteenth to Sixteenth streets, as if the whole had been done under one ordinance and contract at the aggregate cost under both con-

tracts. This will produce equality between the lot-owners presumed to be benefited by the improvement, and is authorized by the spirit, if not by the language, of the twelfth section of the charter, and is demanded alike by justice and the settled doctrine of the law that public burdens must be as nearly equal as is reasonably practicable."

In the case of Schmelz v. Giles, 12 Bush, 491, the Court of Appeals again construed the act, and held that under the act in question no person taxed could be compelled to discharge the burden until an opportunity was afforded him for a hearing upon the formation of the tax limits, the plan of the apportionment, and the justice, regularity, and equality of the burden. The court say:

"It seems to us, therefore, that not only justice, but that uniformity of rule, which ought to exist in laying such assessments, demand that the assessment should extend on each side of the alley to the nearest parallel street. That this conclusion is not only warranted by the language of the charter, and in harmony with the underlying principles which the legislature intended should govern in such cases, but is just and equitable in this particular case we entertain no doubt; nor have we any doubt that such a rule will be just in a very large majority of the cases that will arise. No doubt cases may be imagined, and indeed may occur, in which such a rule will operate unjustly; but the same may be said of nearly every rule of law. Yet that occasional hardships may result has never been deemed a sufficient reason for refusing to adopt a rule which commended itself to the judgment and conscience of the court, and which the court could feel assured would operate with more justice than any other that could be suggested.

"For these reasons the judgment is reversed, and the cause remanded with directions to correct the apportionment so as to charge the appellants' property with its proportion of the cost of improving the alley as indicated in this opinion."

In the case of Preston v. Roberts, 12 Bush, 570, the Court of Appeals again construed the act in question, and held that under its provisions a party taxed before he could be compelled to pay the amount apportioned against him was

entitled to a hearing in a regular judicial proceeding upon the formation of the tax limits. The court say:

"The assessment, according to the terms of the ordinance as set forth in the petition, was required to extend on the west side of the street to a depth of 147½ feet, and as we have already decided the Council had no lawful authority to extend the assessment to any greater depth on the east side, it results therefore that there should have been apportioned against the appellants' property a proportion of the whole cost of the improvement equal to the proportion which the number of square feet owned by him within the depth of 147½ feet bears to the whole number of square feet within the distance of 147½ feet on each side."

It is perfectly plain—too manifest to require further argument—that under the provisions of the act in question, as construed by the Court of Appeals, no burden or tax imposed to pay the cost of improving a public way can be coercively collected until the party taxed has been afforded a full opportunity in the course of judicial proceedings to test every step and act in the imposition of the tax by the local authorities; to test the justice of the tax, the equality of the tax, the plan of the apportionment, the limits of the district, and a compliance by the local government with every term and condition upon which its power to impose the tax is made to depend by its organic law. If this is not due course of law, then the words as used in the Federal Constitution can have no definite meaning.

3. The plaintiffs in error insist that, under the provisions of section one of article fourteen of the amendments to the Federal Constitution, the States are prohibited from imposing local taxes for local improvement in excess of benefits to the district taxed, and that the exercise of this power of local taxation makes it incumbent upon the States to provide a judicial tribunal to determine the benefits, in excess of which it is insisted the power to impose local taxation is forbidden to the States by the Federal Constitution.

It is conceded that the improvements provided for in the

act in question are such as the State of Kentucky had the authority to make and pay for by assessments upon the property interested. This court say, in the case of Davidson v. New Orleans, 96 U. S. 97:

"Can it be necessary to say that if the work was one which the State had the authority to do and to pay for it by assessments on the property interested, that on such questions of method and detail as these the exercise of the power is not regulated or controlled by the Constitution of the United States."

In the case of Hagan v. Reclamation, 111 U. S. 701, this court say:

"The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California for the purpose of reclaiming overflowed and swamp lands can be enforced only by suits, and of course to the validity it is essential that notice be given to the tax-payer and an opportunity be afforded to him to be heard respecting the assessment. In them he may set forth by way of defense all his grievances. If property taken upon an assessment which can only be enforced in this way be not taken by due process of law, then, as said by Mr. Justice Miller in the New Orleans cases, these words, as used in the Constitution, can have no definite meaning."

In the case of Mobile v. Kimball, 102 U. S. 691, this court say:

"When any public work is authorized it rests with the legislature, unless restrained by the constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure. It may be that the act in imposing upon the county of Mobile the entire burden of

improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expense of the improvement, which was to benefit the whole State, among all the counties. But this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation. The judicial power of the Federal Government can only be invoked when some right under the Constitution, laws, or treaties of the United States is invaded."

In the case of Kelly v. Pittsburgh, 104 U. S. 78, this court say:

"It is probably true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can undertake to adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain the organization? or to insure in this respect absolute equality of burden and fairness in its distribution among those who must bear it? . . . . Clearly, however, these are matters of detail, within the legislative discretion, and therefore of power in the law-making body within whose jurisdiction the parties live. This court can not say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the tax-payer without due process of law."

In McMillen v. Anderson, 95 U. S. 37, this court say:

"A statute which gives a tax-payer a right to enjoin the collection of a tax, and to have the validity of the tax decided by a court of justice, is due process of law."

In the case of Wurts v. Hoagland, 114 U. S. 229, this court say:

"As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and an opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws nor been deprived of their property without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States."

In the case of the United States v. Memphis, 97 U. S. 284, this court say:

"Surely the legislature is not prohibited from declaring what districts shall be liable to taxation for local uses."

In the case of Laramie v. Albany, 92 U. S. 307, this court say:

"The legislature of a State possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such a manner as to them may seem reasonable."

In the case of Pearson v. Zable, 78 Ky. 173, the Court of Appeals say:

"But it by no means follows that each piece of property within the bounds over which the assessment extends must in fact derive a benefit from the improvement. The area over which the assessment extends constitutes for the occasion a tax district. Whether the property within that district considered as an entirety will be benefited by the proposed improvement is a question to be decided primarily by the legislature. And when that department, whether acting directly or through the local authorities to which it may have delegated the power to determine when such improvement shall be made, and the cost of making it to be assessed upon adjacent property, there is a decision by the legislature that the property within the district will be benefited. This decision will generally be final and conclusive upon the question of benefits to the district as a whole, and also that public convenience demands that the improvement be made."

Burroughs on Taxation, 446, states this text:

"The district is generally defined by the legislature in the act authorizing the assessment by the local officers, and when so defined the power is almost unlimited. The power to apportion the tax is one of the inherent powers of the legislature, and when in their discretion they impose the expense of a public improvement on a designated district, it is only in cases where it is clear that the district receives no benefits that the courts will interfere with the exercise of the power."

Shelby v. Shelby, 5 Bush, 225.

Mayor v. Brooklyn, 4 Comstock, 420.
Burnett v. Sacramento, 12 Cal. 76.
Lexington v. McQuillan, 9 Dana, 513.
Dorgan v. Boston, 12 Allen, 223.
Nicholas v. Bridgeport, 36 Conn. 255.

Cooley on Taxation, page 110, states this text:

"When the nature of the case does not conclusively fix it, the power to determine what shall be the taxing district for any particular burden is purely a legislative power, and not to be interfered with or controlled except as it may be limited or restrained by constitutional provisions. Judicial tribunals can not interfere with legislative discretion, however onerous it may be, and where it was objected that a certain construction of a statute would throw upon one locality the expenses of constructing a road for State purposes, the conclusive answer was declared to be that the State may impose such a burden where in the wisdom of the legislature it is considered that it ought to rest."

Howell v. Buffalo, 37 N. Y. 267.
Hingman v. Norfolk, 6 Allen, 353.
Challis v. Parker, 11 Kansas, 394.
Malchus v. Highlands, 4 Bush, 547.
Scoville v. Cleveland, 1 Ohio State, 126.
Hill v. Higdon, 5 Ohio State, 243.
Langhorne v. Robinson, 20 Grattan, 661.
Shaw v. Dennis, 5 Gilman, 405.
People v. Richmond, 20 N. Y. 252.
Davidson v. New Orleans, 96 U. S. 97.

In view of the facts presented by this record, the defendants in error submit that upon no theory of the law is there any valid claim upon which the plaintiffs can maintain their right to a writ of error in this case. The motions of the defendants in error to dismiss for want of jurisdiction, and to affirm as a delay case, are respectfully submitted.

J. K. GOODLOE,
*Attorney for Defendants in Error.*

## REFERENCES.

Under the provisions of the act in question, no tax is authorized to be levied except upon the terms of equality and for a public purpose.

Vol. 1, p. 990, Sess. Acts, 1881–2, Kentucky Legislature.
Preston v. Roberts, 12 Bush, 570, 585.
Beck v. Obst, 12 Bush, 268.
Schmelz v. Giles, 12 Bush, 491.

Under the provisions of this act no tax or burden imposed can be coercively collected until the party taxed has been afforded a full and fair opportunity on notice to him, and in the due course of judicial proceeding to be heard as to the regularity and legality of every step and act taken by the local authorities in the imposition of the burden or tax, to be heard as to the justice and equality of the tax, as to the plan of the apportion, the formation of the tax district, and as to the compliance by the local authorities with every term and condition upon which their power to impose the tax or burden is made to depend by the organic law of the city of Louisville. This is due process of law.

Vol. 1, p. 990, Sess. Acts, 1881–2, Kentucky Legislature.
Preston v. Roberts, 12 Bush, 570, 585.
Beck v. Obst, 12 Bush, 268.
Schmelz v. Giles, 12 Bush, 491.
Davidson v. New Orleans, 96 U. S. 97.
Hagar v. Reclamation, 111 U. S. 701.
Mobile v. Kimball, 102 U. S. 691.
Kelly v. Pittsburgh, 104 U. S. 78.
McMillen v. Anderson, 95 U. S. 37.
Wurts v. Hoagland, 114 U. S. 229.

Section one of article fourteen of the amendments to the Constitution of the United States imposes no restriction on the power of the legislature to define and create a tax district, and to lay taxes upon the property in such district in aid of a local public improvement, and to apportion such burden or taxes.

United States v. Memphis, 97 U. S. 284.
Laramie v. Albany, 92 U. S. 307.
Mobile v. Kimball, 102 U. S. 691.
Pearson v. Zable, 78 Ky. 173.
Burroughs on Taxation, 446.
Cooley on Taxation, 110.
Shelby v. Shelby, 5 Bush, 225.
Mayer v. Brooklyn, 4 Com. 420.
Burnett v. Sacramento, 12 Cal. 76.
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Langhorne v. Robinson, 20 Grattan, 661.
Shaw v. Dennis, 5 Gilman, 405.
People v. Richmond, 20 N. Y. 252.
Davidson v. New Orleans, 96 U. S. 97.